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BERNE CONVENTION

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Mr. PELL, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany Treaty Doc. 99-27]

The Committee on Foreign Relations, to which was referred the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, and revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971 and amended in 1979, having considered the same, reports favorably thereon without amendment and recommends that the Senate give its advice and consent to ratification thereof.

PURPOSE

The purpose of the Berne Convention is to provide protection for the rights of authors in their literary and artistic works. The extent of protected works is broad, ranging from conventional works—such as books, motion pictures, and music—to new technological works, including video cassettes and computer-related software. The convention contains detailed provisions that specify minimum levels of protection to be provided by member nations.

BACKGROUND

Twelve years ago, Congress passed the Copyright Act of 1976, the first general revision of U.S. copyright law since 1909. The passage of this act was the culmination of years of legislative efforts.

While a relatively obscure discipline, copyright law touches every American in their homes, schools, libraries, and workplaces. Determining the scope of a law which deeply affects how all of us may enjoy books, films, television, programming, computer software, information products and services, music, and visual arts requires

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great caution, particularly in a changing society that seeks both the free flow of information and the free marketplace.

The Berne Convention is the oldest and most important multilateral copyright treaty. It was negotiated in 1886. Its latest revision was completed in 1979. The United States has not adhered to the Berne Convention because of differences of certain copyright principles. These differences include U.S. requirements for copyright formalities such as notice and registration, and requirements for domestic manufacture to obtain protection. The United States, the Soviet Union, and the People's Republic of China are the only major countries that are not parties to the convention.

The United States belongs to a more recent treaty, the Universal Copyright Convention (U.C.C.). Both treaties are administered by United Nations organizations: Berne by the World Intellectual Property Organization, and the U.C.C. by UNESCO. The United States has a seat on the committee that oversees the U.C.C., but since the United States withdrew from UNESCO, we have a smaller voice and no formal vote in the overall planning and budgeting process affecting U.C.C.-related activities.

If the United States adheres to the Berne Convention, it will improve relations with 24 nations that adhere to Berne, but not the U.C.C., and with whom U.S. copyright relations are nonexistent or unclear.

The benefit most frequently pointed to in support of U.S. adherence to the Berne Convention appears to be enhanced political credibility in our global effort to strengthen copyright norms, to suppress piracy, and to secure in all countries a realistic minimum standard of protection for creative works. A major forum in which this policy objective is being sought is the General Agreement on Tariffs and Trade (GATT). The United States is seeking within GATT the adoption of a code or standard of conduct relating to the protection of intellectual property. For copyrights, that standard or code may well be the minimum economic rights of the Berne Convention. If the United States joins Berne, our trade negotiators around the world could insist on these standards as those that constitute adequate protection for GATT as well as for bilateral purposes.

Committee Action

On July 11, 1988, the committee held a public hearing on the Berne Convention. Testimony was received from the following individuals: (1) The Honorable Eugene J. McAllister, Assistant Secretary of State for Economic and Business Affairs; (2) Mr. Ralph Oman, Register of Copyrights, Library of Congress; and (3) Mr. John K. Uilkema, Chairman, Section of Patent, Trademark and Copyright Law, American Bar Association.

The committee considered the convention at its business meeting on July 13, 1988, and by voice vote agreed to report it favorably to the Senate for its advice and consent.

Implementing Legislation

Conforming U.S. law to the Berne Convention will involve changes in the 1976 Copyright Act. Implementing legislation has

been reported from both the Senate and House Judiciary Committees (S. 1301 and H.R. 4262). The hearings conducted on this legislation during the last 3 years highlighted a number of issues of congressional concern. The following is a brief explanation of some of these issues.

(A) MORAL RIGHTS ISSUE

The Berne Convention creates rights in works other than works made for hire. The rights of "paternity" and "integrity" are provided, and are independent of the economic rights in the work. The right of paternity means that authors may claim authorship in their works, independently of any license or conveyance of their copyrights; the right of integrity gives them power to object to any distortion, mutilation, or alteration of their works that would prejudice the author's honor or reputation. Again, such objections could be made by the author even where the author has parted with the copyright. Since the 1950's, when close examination of the moral rights question under U.S. law began, it has been argued that rights substantially equivalent to moral rights as they exist in nations of the Berne Union are provided for in a variety of federal and state laws considered together. There is no doubt that the Berne Convention requires recognition of these rights. The question is whether such rights exist within the United States with the degree of national uniformity and predictability which should be provided in order fairly to comply with Berne requirements.

Both House and Senate Judiciary Committees concluded that the current U.S. law meets the convention's requirements.

(B) SELF-EXECUTING TREATY ISSUE

Under the U.S. Constitution, treaties are the supreme law of the land. They supersede prior laws with which they conflict. Some treaties are self-executing, while others require implementing legislation to enter into effect.

If an international agreement is silent as to its self-executing character, then one must look to statements of the Executive and Congress to make this determination. In the case of the Berne Convention, the President, in his letter of transmittal, stated that "* * * the Convention will require legislation. Until this legislation is enacted, the United States instrument of accession will not be deposited with the Director General of the World Intellectual Property Organization." In addition to the President's statement, both Senate and House Judiciary Committees have emphatically stated that this convention is not self-executing.

(C) REGISTRATION

As a general proposition, adherents to the Berne Convention obligate themselves not to impose certain kinds of conditions or requirements (that is, formalities) on the "enjoyment and the exercise" of rights of authors outside the country of origin of the work.

The Senate-reported bill reflects a belief that in order to comply with this general proposition, the United States must repeal existing law which requires a party bringing an infringement suit to

first register or attempt to register for the copyrighted work. The House bill does not repeal existing law.

The current registration system is the source of acquisitions for our library system through the copyright office which is a department of the Library of Congress. To repeal the registration requirement might have an adverse effect on this system.

(D) JUKEBOX COMPULSORY LICENSE

The Berne Convention does not permit compulsory licensing of nonbroadcast performances. However, U.S. law allows the compulsory licensing of the performance of nondramatic musical works by playing the record embodying the music on a coin-operated jukebox (phono record).

The Judiciary Committees considered, but rejected, the complete elimination of the jukebox compulsory license. Instead, the committee fashioned a compromise that encourages the representatives of authors and jukebox operators to negotiate licenses or submit to arbitration. If negotiations fail, the compulsory license provisions of current U.S. law would operate.

(E) ARCHITECTURAL WORKS

In order to be compatible with the Berne Convention, U.S. copyright law must protect the subject matter that is entitled to protection under Berne. To ensure that U.S. law protects architectural works to the extent required by Berne, the Judiciary Committees propose the amendment of existing law to include "architectural plans."

It is the intent of the House and Senate Committees to merely codify the current law governing architectural plans and drawings. The same standard of physical or conceptual separability applied by the courts to other pictorial, graphic, and sculptural works applies to architectural works. Specifically, this means that even though the shape of a useful article, such as a building, may be aesthetically satisfying and valuable, the copyright law does not protect the shape. Only those elements, if any, that can be identified separately from the shape of the useful article (as a simple example, a gargoyle on a building) are copyrightable.

In the case of architectural works, in addition to protection for separate artistic sculpture or decorative ornamentation, purely nonfunctional or monumental structures, as well as models, may be subject to copyright.

Major Provisions

The latest version of the Berne Convention is the text agreed to on January 24, 1971 at Paris. The following summary of the 1971 text was included in the Letter of Submittal to the President from the Secretary of State on June 4, 1986:

> Article 1 of the Convention establishes that the countries to which it applies form a single Union.
>
> Article 2 defines the subject matter of protection: "literary and artistic works". These include all productions in the literary, scientific and artistic domain, without limita-

tion by reason of the mode or form of their expression. The value, merit or intended purpose of a work is irrelevant to protection under the Convention. Further, the list of protected works in Article 2 is intended to be merely illustrative rather than exhaustive. A State party to the Berne Convention remains free to maintain legal standards which determine whether particular examples of the kinds of works listed in Article 2 are to be protected; that they involve some minimum of creative expression; that they be original in their creation (that is, done without copying); and that protection for a work not extend to the underlying ideas, systems, formats or utilitarian aspects of a work which would fall into the realm of industrial rather than literary and artistic property.

Article 2(2) of the Convention authorizes States to require as a condition of protection of a work that works be "fixed in some material form", thus permitting the exclusion from protection of ephemeral performances not reduced to a medium of tangible expression.

Article 2(3) of the Convention establishes the principle of the protection of derivative works independently of the original works upon which they are based and without prejudice to the copyright status of the underlying original.

Article 2(4) and (5) deal with protection of so-called official texts and collective works. Protection of the former is left entirely to national discretion. In the latter case, such collections of pre-existing materials which evidence intellectual creativity by reason of the "selection and arrangements of their contents" are to be protected as original works, apart from the copyright status of the particular contents.

Article 2(6) establishes the central principle that works mentioned in Article 2(2) enjoy protection in all countries of the Union and that such protection "shall operate for the benefit of the author and his successors in title."

Article 2(7) constitutes an important exception to the general obligation derived from Article 2(2) to protect works of "applied art," and industrial designs and models. The Convention permits States to set the extent of application of their copyright laws to such works as well as to prescribe conditions for their protection. This discretion is limited with respect to the term of protection which is set at a minimum of 25 years from the making of the work.

Article 2(8) provides that protection of works under the Convention shall not require the protection of "news of the day" or to "miscellaneous facts having the character of mere items of press information". This provision is in general accordance with well-accepted copyright principles which protect the creative expression of an author, but not the underlying factual information which such expression relates.

Article 2bis of the Convention provides that the scope of protection accorded political speeches and speeches deliv-

ered in the course of legal proceedings and of lectures and addresses is subject to national discretion. The Convention requires only that the right of the author of such oral works to make or authorize the making of a collection of such speeches or lectures be recognized.

Article 3 contains the first of a number of provisions the object of which is to lay down the points of attachment of the Convention, i.e., the conditions to be fulfilled if protection is to be enjoyed under it. The Convention protects the works of authors who are nationals of the countries of the Union (or have their habitual residence in one of them), whether published or not and wherever first published—either in a Union country or elsewhere, as well as works of any national first published in a Union country.

Article 4 provides special points of attachment for motion pictures and architectural works which do not have "nationality" in the ordinary sense of Article 3 of the Convention. Article 4 deals with this problem by establishing that the Convention's protection extends to films, the maker of which "has his headquarters or habitual residence in one of the countries of the Union;" and, to architectural works "incorporated in a building or other structure located in a country of the Union."

Article 5 sets out the fundamental principles on which the Convention is based: national treatment; automatic protection; and the independence of copyright protection as between the country of origin of a work and the other countries of the Union. It assures, first of all, to protected works national treatment; that is, works which originate in a Berne Union country obtain in all other Berne Union countries the same protection as the latter give to the works of their own nationals as well as the rights specially granted by the Convention.

Article 5(2) requires automatic protection, that is, the enjoyment and exercise of rights may not be conditioned on the observance of any formality whatsoever. The same Article establishes the principles of the independence of protection. This means that, apart from the specific provisions of the Convention (the Convention minima), the extent of protection is governed by the laws of the country where protection is claimed, and not dependent upon protection anywhere else, nor upon reciprocity.

Further, Article 5 establishes the rule that protection within the country of origin of a work (the place of first publication for published works) is a matter exclusively for the domestic law of that country and is outside the scope of Convention obligations. This is true whether the author is a national of that country or not.

Article 6 allows Union countries the possibility of restricting protection in the case of works of nationals of certain non-Union countries which fail to protect in a adequate manner the works of nationals of Union countries. This provision was introduced into the Convention in order to permit limited retaliation against non-Union member

countries whose nationals secured protection within the countries of the Union by the device of first publishing their work in a Union State. Although it was never invoked for that purpose, the provision was designed for use against the United States, which had at the time a copyright law less generous than those found in States party to the Berne Convention, and whose publishers had regularly published their works in Canada in order to claim, through the so-called "backdoor", protection under the Berne Convention.

Article 6bis provides that, in addition to economic rights, copyright under the Convention also encompasses so-called moral rights. These rights including the author's prerogatives to claim the paternity of his or her work (to be correctly credited as the author) and to object to any distortion, multilation or other modification of the work which would be prejudicial to the author's honor or reputation.

The Convention further establishes that moral rights shall generally extend for the term of economic rights; that is, even after the death of the author. Nonetheless, Article 6bis(2) of the Convention permits Union States to determine by whom such right may be exercised *after* the author's death; and, States which have not at the time of accession to the Convention, extended moral rights into the post-mortem term of copyright, may limit rights during this period. In general, the precise means by which authors and their successors to moral rights may exercise and obtain redress for violations of moral rights are left to national discretion.

Article 7 sets out the minimum term of copyright duration binding on all countries of the Union. The general rule is for a term of life of the author and fifty years after his death. However, for certain works for which calculation of term based upon the life of a natural person is impractical, or out of step with the laws of many countries, Article 7 provides special terms. Thus, Article 7(2) provides a minimum term of copyright in motion pictures of 50 years from public availability of the work, or, in the absence of release, 50 years from the making of the work. Under Article 7(3) anonymous and pseudonymous works are assured a term of 50 years from first public availability of the work or 50 years from the death of the author, should his or her identity become known. Works of applied art and photographs are given a minimum term of protection of 25 years from the making of such works by virtue of Article 7(4).

These are, of course, minimum terms of protection. Article 7(6) provides that Berne members may grant protection for a longer period than provided for in Articles 7(1)–(4). Of particular importance is Article 7(8) concerning reconciliation between the laws of States whose terms of copyright differ as to specified works. The term of copyright in a work is determined by the law of the country where protection is sought; however, the term of protection need not

exceed that established in the country of origin of the work. Countries of the Union, may, of course, choose by legislation to grant strict national treatment as to term, regardless of the period of protection established for a work in the country of origin. This so-called "rule of the shorter term" in Article 7(8) is an exception to the national treatment obligation.

Article 8 allows the author the exclusive right to translate the work or to authorize the translation of his or her work. The Berne Convention traditionally limited the obligation of States in the Union to respect translation rights fully, during the normal duration of copyright protection. Earlier texts of Berne authorized Union States to limit the period of authors' control over translations of their works to a period of 10 years from first publication. As now written, Berne has established a complete translation right normally effective during the full term of copyright in a work, life plus 50 years post mortem.

Article 9 gives the author of a literary and artistic work the exclusive right of authorizing the reproduction of the work, in any manner or form. It should be noted here that the Convention does not establish the exclusive right of the author to control the public distribution of copies of his or her work. It is considered by many States that the right of the author to first publish his or her work was an aspect of moral rights; and, further, effective control over the right to distribute copies to the public was assured through the establishment of the right of reproduction in Article 9.

Article 9 (2) and (3) permit countries of the Union to make exceptions to the exclusive right of reproduction "in certain special cases", so long as an exception does not "conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." This general formulation of the power to exempt incidental or commercially insignificant uses of works from the right of reproduction leaves States with a considerable degree of discretion in connection with "fair uses" of copyrighted materials and similar non-infringing reproductions of protected works. Exceptions to the reproduction right may relate to sound or visual recordings as well as the traditional reprographic reproduction of printed materials.

The various subsection of Article 10 concern the free use of copyrighted works in a variety of contexts, some of which are quite familiar to United States law and practice. Thus, Article 10(1) permits quotations from published works so long as it is "compatible with fair practice" and justified by the purpose of the quote.

Article 10(2) concerns the utilization of copyrighted works in teaching activities. It provides that national legislation and special agreements among Union countries may determine the terms under which literary and artistic works may be used for teaching purposes. Such uses are,

again, subject to the limitations of "fair practice" and justifiable given the purpose in a teaching context. These exceptions to copyright extend to the utilization of works in publications, broadcasts or sound or visual recordings. The Convention requires, however, that uses of works under the formula of Article 10(2) require crediting the source of the material and the name of the author if it appears on the copy of the work utilized.

Article 10bis establishes special exceptions in connection with the use of protected works in newspapers or broadcasts and in the reporting of current events, generally. Article 10bis(1) allows reproduction by the press—electronic or otherwise—of "articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character". The Convention provides, however, that such an exception can be established only with respect to works where the right to such reproduction, broadcasting or other communication thereof "is not expressly reserved."

Article 10bis(2) permits legislative exceptions to the incidental reproduction of protected works during the course of coverage of current events or other newsworthy activities.

Article 11, 11bis and 11ter concern important contemprary rights under copyright: public perfomance, recitations and broadcasting activities. Although quite detailed, the provisions of these articles appear to reflect the basic elements of copyright law common to industrialized countries including the United States. Thus, Article 11(1) provides that authors of dramatic, dramatico-musical and musical works have the exclusive right to control the public performance of their works by any means or process and the communication to the public of performances of their works. These rights extend to works in their original or translated forms.

The rights of public performance provided for in Article 11 extend to all sorts of performances with the exception of broadcasting. Thus, the performance of a work in live concert, in a public place by means of phonorecords, or a controlled transmission of a performance to a paying audience, would come within the scope of the exclusive rights established under Article 11. This is of importance in view of the fact that the Convention does not appear to authorize specific, permissible, limitations on the right of authors over these sorts of public performances, but clearly does so with respect to performances through broadcasting.

Article 11bis(1) deals with the right of authorizing the broadcasting of a work, the communication to the public of broadcasts by wire or rebroadcasting "when this communication is made by an organization other than the original one", or the communication of broadcasts to the public by loudspeaker.

Article 11bis(2) authorizes national legislation to determine "the conditions under which the rights" broadcast-

ing, rebroadcasting and the public communication of broadcasts in Article 11bis(1) may be exercised. In the absence of agreement among the parties (and without prejudice to moral rights), equitable remuneration may be set by a "competent authority" of the State.

Article 11bis(3) concerns so-called "ephemeral recordings" the subject of Section 112 of the United States Copyright Law. This provision of Berne allows States to enact legislation premitting authorized broadcasters of a work to make ephemeral recordings of works for the purpose of carrying out their own broadcasting activities.

Finally, Article 11ter establishes the right of the author of a literary work to authorize the public recitation of his or her new work "by any means or process" and the authorize any communication to the public of the recitation of the work. These rights extend to literary works in their original form or in translation.

Article 12 of the Convention concerns so-called derivative works; that is, independently copyrightable transformations or adaptations of pre-existing works, such as the making of a novel into a film, or the arrangement of a piece of music for a particular instrument or group of instruments. Translations of works, dealt with as a separate activity and work are, in fact, a form of derivative work. This Article establishes the rule that authors enjoy the exclusive right to authorize the creation of derivative works based upon their copyrighted original. (Article 2(3) of the Convention established the principle that adaptations are protectable independently from the original works upon which they are based.)

Article 13 allows member countries to limit the exclusive right to contract the further recording of musical works after the first authorized recording and distribution of copies of such recordings. Essentially, this Article permits the compulsory licensing of the right to make sound recordings of protected musical compositions in much the same fashion as has long been provided for in the United States Copyright Law.

Article 13(3) reinforces the territorial basis of Article 13 compulsory licensing by requiring Union States to establish provisions for the seizure of recordings produced in one country under a compulsory license and imported into another country without the permission of the concerned parties.

Article 14 sets out special rules governing rights and copyright ownership in cinematographic works. These provisions are of particular importance to the United States film industry. They were included in the Berne Convention at the Stockholm Revision Conference (1967) and have as their aim the harmonious reconciliation of the laws of Berne States which have important differences in approaching the question of authorship, ownership of rights and their exercise in the film area.

Article 14(1) sets down the right of authors of literary and artistic works to authorize the making of their works into films and their reproduction in film form, as well as to authorize the distribution of such films. Further, authors of literary and artistic works are accorded the right to control the public performance and communication to the public by wire of their works which are reproduced or adapted to film.

Article 14(2) provides that the author of an original work made into a film retains control over the further adaptation of his or her work from such an authorized film. Essentially, this means that when a novel is made into film, a party who wishes to make the film into a musical version will require authorization from the novelist and, in accordance with Article 14bis(1), the filmmaker.

Article 14(3) provides that the compulsory license for the use of musical works in sound recordings, established in Article 13(1), is not applicable to films.

Article 14bis deals with the rights of artistic contributors to films. Article 14bis(1) begins by affirming the copyrightability of films as independent works, apart from the original work upon which such film may have been based. Article 14bis(2) provides that ownership of copyright in a film is a matter for the legislation of the country where protection is sought. Succeeding articles create a system of limited presumptions, modifiable by express contract, under which the "authors who have brought contributions to the making of the work" may be held to have consented by their participation in the making of the film to the reproduction, distribution, public performance, communication to the public by various means, subtitling or dubbing of the film embodying their various contributions. States where protection is sought for films may, however, require that the undertaking of contributors to films be in writing for such a presumption to apply. Finally, if such presumptions are to apply to the contributions to a film made by the principal director, scenarist or composer of music works created for the film, national legislation must expressly so provide.

Article 14ter of the Convention concerns a realm of copyright known as the "droit de suite". This system of law concerns original works of art and original manuscripts of writers and composers. It permits the authors of such material embodiments of their creativity to enjoy the enhanced value of unique copies of their works which accure with time and subsequent sales and resales. The most classic example of the application of "droit de suite" is the case of the fine art painting, sold for little at first, but acquiring considerable value as the reputation of the artist increases over time. "Droit de suite" would permit the creator, or after his or her death, such persons authorized by legislation, to "enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work." The Convention does not

mandate that "droit de suite" be established in countries of the Union; it regulates, instead, the application of the system among countries of the Union which have established the system. In general, "droit de suite" may be claimed for works originating in a country of the Union only in such countries which have the system in their copyright laws and, further, only where the country of origin of such works also recognizes "droit de suite". In short, the benefits depend upon reciprocity.

Article 15 of the Convention deals with presumptions as to the authorship of works. In general, copyright enforcement actions may be brought by the author of a work and Article 15(1) provides that, in the absence of proof to the contrary, the person whose name appears in the normal fashion on the work shall be presumed to be the author and entitled to institute infringement proceedings in Union countries. This rule is extended to the persons or corporate bodies whose name appears on films, "in the usual manner." Article 15(3) authorizes the publisher of an anonymous or pseudonymous work to represent the author and enforce his or her rights. Finally, Article 15(4) authorizes States to designate authorities to protect and enforce in other States party to the Convention the rights of authors of unpublished works where the identity of the author is unknown but "there is every ground to presume that he is a national of a country of the Union."

Article 16 allows the author (or his successor in title) to take steps to seize infringing copies of his work. Each country may choose its own conditions, and the provision only applies if the work in question is protected in the country concerned.

Article 17 provides that the provisions of the Convention cannot affect in any way the right of governments of each State party "to permit, to control or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right."

Article 18(2) deals with the way in which the Convention applies to works already in existence when their country of origin first joins the Union. There is no obligation to protect works which, when their country of origin first becomes a Union country, are already in the public domain there. If, in the country where protection is claimed, a work was once protected but that protection has lapsed because its term has come to an end, there is no obligation to protect it anew.

Article 19 states that the minimum rights prescribed by the Convention form the basis of the Union but if, under the national laws of member countries, Convention nationals and their successors in title can claim better copyright treatment, nothing stops their doing so.

Article 20 deals with special agreement between the member countries such as bilateral treaties which go fur-

ther in protecting authors than the Convention itself. It makes clear that there is nothing in the Convention which prevents the continuation of such treaties.

Article 21 introduces the Appendix containing special provisions for developing countries.

Articles 22 to 26 are administrative clauses that were added to the Berne Convention at the Stockholm Conference in 1967. They relate to such matters as the administrative bodies of the Berne Union (Assembly and the Executive Committee), the Secretariat called the International Bureau, finances, and the manner of amending Articles 22 to 26.

Article 27 relates to the revision of all other articles (excepting Articles 22 to 26) of the Convention and provides that such revision shall be by unanimity.

Article 28 concerns the acceptance and entry into force of the Paris Act (1971) of the Berne Convention by Berne Union countries (i.e. member States).

Article 29 deals with accession and entry into force for nonmember States of the Berne Convention.

Article 29bis concerns a technical point as to the relationship between the Paris Act (1971) of the Berne Convention and the Convention Establishing the World Intellectual Property Organization (1967).

Article 30 regulates reservations to the Convention by newly adhering States.

Article 31 sets out the conditions under which the Berne Convention can be applied to territories whose external relations are the responsibility of another country.

Article 32 regulates the relations between member countries of the Berne Convention bound by different texts of the Convention.

Article 33(1) provides that any dispute between two or more member countries over the interpretation or application of the Convention, not settled by negotiation, may, by any one of the countries concerned be brought before the International Court of Justice. However, Article 33(2) permits a country to declare, at the time it accedes to the Convention, that it will not be bound by Article 33(1).

Article 34 provides that no country may ratify or accede to any Act prior to the Paris Act (1971) once the substantive provisions of this Act entered into force (i.e. October 10, 1974).

Article 35 states that the Convention remains in force indefinitely and that a country may not denounce the Convention earlier than five years from the date of its adherence.

Article 36 states explicitly that a member State must adopt the measures necessary to ensure the application of the Convention and that when a country becomes bound by the Convention, it must be in a position under its domestic law to give effect to the various provisions of the Convention.

Article 37 contains clauses on such matters as authentic texts of the Convention (English and French), official texts of the Convention, and notifications of ratification or accession to the Director General or WIPO.

Article 38 pertains to transitional provisions which provided for a changeover from the earlier United International Bureau for the Protection of Intellectual Property to the new World Intellectual Property Organization which came into being in April 1970. This Article would have no effect on the United States upon adherence to the Berne Convention.

The Appendix to the Convention, made up of six articles, allows Union countries classified as developing countries, more latitude regarding the rights of translation and of reproduction than is normally permitted by the Convention proper.

A developing country may provide for a regime of non-exclusive, non-assignable compulsory licenses carrying an obligation to make fair payments to the copyright owner, to translate and/or reproduce works protected by the Convention, exclusively for systematic instructional activities (or in some cases for teaching, scholarship or research).

The copyright owner enjoys a period in which to exercise his exclusive rights. If he does so, no compulsory license can be granted in the country in which he has exercised it for the use in question. If a license is granted, it covers only the country in question and export of copies made under it is forbidden.

The payment to be made by the compulsory licensee must be consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned and must be transmissible to the copyright owner.

Text of Resolution of Ratification

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, and revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971 and amended in 1979.

APPENDIX

The following statements and letters of support have been included in the hearing record:

STATEMENT OF

EUGENE MCALLISTER

ASSISTANT SECRETARY FOR

ECONOMIC AND BUSINESS AFFAIRS

BEFORE THE

SENATE FOREIGN RELATIONS COMMITTEE

JULY 11, 1988

I AM MOST PLEASED TO HAVE THIS OPPORTUNITY TO APPEAR FOR THE FIRST TIME BEFORE THIS COMMITTEE AND PRESENT THE ADMINISTRATION'S SUPPORT FOR UNITED STATES ADHERENCE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS. I AM ACCOMPANIED BY MICHAEL KEPLINGER, ATTORNEY ADVISER IN THE PATENT AND TRADEMARK OFFICE, U.S. DEPARTMENT OF COMMERCE. ALSO ACCOMPANYING ME IS LAIRD ROBERTSON OF THE DEPARTMENT'S LEGAL ADVISER'S OFFICE.

IN THE 1980'S THERE HAVE BEEN IMPORTANT DEVELOPMENTS AFFECTING INTELLECTUAL PROPERTY THAT HAVE FOCUSED ATTENTION ON INTERNATIONAL COPYRIGHT PROTECTION.

In the first place, there has been a great increase in copyright piracy all over the world. For example, a recent report of the International Trade Commission estimated revenue losses in the entertainment industries, including motion pictures and all audio and video recordings, due to inadequate copyright protection at about $2 billion in 1986. Our private copyright interests firmly believe that adherence to the high-level Berne Convention is an important way to alleviate piracy of valuable U.S. copyrighted materials.

Secondly, intellectual property protection has become an important foreign trade issue. In the Uruguay Round negotiations the United States has advocated an agreement on intellectual property norms under the General Agreement on Trade and Tariffs (GATT) which would be acceptable to a broad range of developing as well as developed countries. The copyright norms proposed for this agreement would largely be based on the high levels of protection in the Berne Convention.

LARGELY BECAUSE OF THESE DEVELOPMENTS THERE WAS HEIGHTENED INTEREST IN THE EXECUTIVE BRANCH AND IN THE CONGRESS IN ACCESSION TO THE BERNE CONVENTION. THE QUESTION OF UNITED STATES ADHERENCE TO BERNE WAS CONSIDERED BY THE STATE DEPARTMENT'S INTERNATIONAL COPYRIGHT PANEL IN 1984, WHICH IS COMPOSED OF A BROAD SPECTRUM OF PRIVATE PRODUCER AND CONSUMER ORGANIZATIONS. THE PANEL REACHED A CONSENSUS IN FAVOR OF ADHERENCE. FOLLOWING FAVORABLE CONSIDERATION BY ALL INTERESTED AGENCIES, THE PRESIDENT IN JUNE 1986, ACTING ON A STRONG RECOMMENDATION BY THE SECRETARY OF STATE SENT THE BERNE CONVENTION TO THE SENATE FOR ADVICE AND CONSENT TO ACCESSION.

BEGINNING IN THE SPRING OF 1985 THE SENATE AND HOUSE JUDICIARY COMMITTEES CONDUCTED A SERIES OF HEARINGS ON THE QUESTION OF U.S. ADHERENCE TO BERNE AND THE NECESSARY IMPLEMENTING LEGISLATION. NUMEROUS ADMINISTRATION OFFICIALS INCLUDING SECRETARIES OF COMMERCE BALDRIGE AND VERITY, AMBASSADOR YEUTTER, U.S. TRADE REPRESENTATIVE, AND UNDER SECRETARY OF STATE FOR ECONOMIC AFFAIRS, ALLEN WALLIS, HAVE TESTIFIED IN STRONG SUPPORT OF ADHERENCE TO BERNE.

AS YOU KNOW, MR. CHAIRMAN, IN HIS MAY 3, 1988 LETTER TO YOU, SECRETARY SHULTZ AGAIN STRESSED THE HIGH PRIORITY WHICH THE ADMINISTRATION HAS GIVEN TO THIS CONVENTION.

TO SUMMARIZE, MR. CHAIRMAN, THE ADMINISTRATION'S POSITION SUPPORTING ADHERENCE TO BERNE IS BASED ON OUR FIRM BELIEF THAT THE ADVANTAGES OF MEMBERSHIP IN BERNE FAR OUTWEIGH ANY POSSIBLE DISADVANTAGES. FOLLOWING ARE THE MORE IMPORTANT ADVANTAGES:

o OUR ADHERENCE TO THE BERNE CONVENTION WILL PLACE THIS COUNTRY IN A POSITION TO EXERT GREATER LEADERSHIP IN THE INTERNATIONAL COPYRIGHT FIELD COMMENSURATE WITH OUR POSITION AS THE WORLD'S LARGEST PRODUCER OF COPYRIGHTED MATERIALS. MEMBERSHIP IN THE HIGH-LEVEL BERNE CONVENTION WOULD ALSO ENABLE US TO PARTICIPATE IN THE ADMINISTRATION AND MANAGEMENT OF THE CONVENTION.

o UPON ADHERENCE TO BERNE, OUR AUTHORS AND COMPOSERS WOULD OBTAIN HIGH LEVEL COPYRIGHT PROTECTION IN THE 24 MEMBER STATES OF THE BERNE CONVENTION THAT DO NOT BELONG TO THE UNIVERSAL COPYRIGHT CONVENTION.

o UNITED STATES MEMBERSHIP IN BERNE WOULD STRENGTHEN OUR EFFORTS TO NEGOTIATE AN INTELLECTUAL PROPERTY AGREEMENT IN THE GATT AND BILATERAL AGREEMENTS WITH DEVELOPING COUNTRIES BASED ON THE HIGH-LEVEL COPYRIGHT STANDARDS OF BERNE.

o If the United States becomes a member State of the Berne Convention, we would then be a voting participant in the next revision conference of that convention and, in accordance with the Berne "rule of unanimity", we would be able to veto any proposals considered to be detrimental to U.S. copyright interests.

o Adherence to the Berne Convention will avoid possible retaliation against U.S. copyrighted materials by member States of Berne who may resent our "free ride" on the Berne Convention for many years through simultaneous publication in a Berne member State.

o United States adherence to Berne will undoubtedly strengthen this convention to which 79 developed and developing States belong and thus enhance international copyright protection worldwide.

Today we are experiencing a technological revolution involving such innovations as computers, communications satellites, optical discs, and many more. Many international copyright experts here and abroad believe that the Berne Convention is a comprehensive and dynamic instrument which meets the challenges brought on by new technologies.

AFTER MORE THAN A CENTURY OF CONSIDERING MEMBERSHIP IN THE BERNE CONVENTION WE ARE HOPEFUL THAT THE UNITED STATES IS READY TO ACCEPT THE RESPONSIBILITIES OF SUCH MEMBERSHIP.

FINALLY, WE ARE GRATEFUL FOR THE DILIGENT EFFORTS OF THE SENATE AND HOUSE JUDICIARY COMMITTEES, IN PARTICULAR SENATORS DECONCINI, LEAHY AND HATCH, FOR THEIR WORK OVER SEVERAL YEARS TO PRODUCE LEGISLATION TO IMPLEMENT THE CONVENTION. WE ARE DELIGHTED THAT THE HOUSE, UNDER THE LEADERSHIP OF JUDICIARY SUBCOMMITTEE CHAIRMAN ROBERT KASTENMEIER, RECENTLY APPROVED IMPLEMENTING LEGISLATION BY A UNANIMOUS VOTE, AND THAT THE SENATE JUDICIARY COMMITTEE HAS ALSO REPORTED ITS BILL TO THE FULL SENATE.

THANK YOU, MR. CHAIRMAN.

Statement of Ralph Oman
Register of Copyrights
and Assistant Librarian for Copyright Services

Before the Senate Foreign Relations Committee
100th Congress, Second Session
July 11, 1988

Mr. Chairman and members of the Committee, it is a privilege to appear before you today to talk about adherence to the Berne Convention.

Since formal adoption of the Berne Convention over 100 years ago on September 9, 1886, the United States has periodically considered adherence. In the past, the United States has decided against adherence because the required changes in the U.S. copyright law were considered too great a price.

Today, the time is ripe to move forward on Berne adherence. In order to do this a few changes must be made in our domestic copyright law. Since the 99th Congress, the Congressional Subcommittees with authority over copyright legislation have worked hard in determining the areas where our law is incompatible with Berne. Bills proposing to amend our law consistent with Berne obligations have progressed. On May 10, 1988 the House passed the Berne Convention Implementation Act of 1988, H.R. 4262. The Senate is completing work on its bill, S. 1301. The bills are similar with the notable exception of copyright registration and recordation.

The Copyright Office has long supported adherence to the Berne Convention, provided adherence could be accomplished without unwarranted or unwise changes in U.S. copyright law. While we favored the approach of the House bill, we are willing to work out a compromise on the registration

issue. Our statement discusses the history and basic principles of Berne, especially the 1971 Paris version; the emerging consensus favoring U.S. adherence; and the differences in the House and Senate versions of the Berne Convention Implementation Act of 1988.

I. HISTORY AND BASIC PRINCIPLES OF THE BERNE CONVENTION

A. Origin of the 1886 Berne Convention.

The Berne Convention of 1886 was the product of 28 years of study and conferences, which began at the 1858 Congress of Authors and Artists in Brussels, Belgium. Several countries had already undertaken individual efforts to protect the works of foreign authors on the basis of reciprocity. In spite of the protection afforded by the bilateral agreements, negotiated by many European countries, there was still general dissatisfaction with the system. The agreements often subjected copyright protection to a variety of conditions and restrictions, and authors and publishers had to comply with a multitude of formalities. The need for a simpler and more uniform method of protecting the works of authors in countries other than their country of origin became apparent.

In 1878, during a Literary Congress held at Paris under the chairmanship of Victor Hugo, the delegates established a permanent international organization -- the International Literary Association.[1/] During an

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1. In 1884 the word "artistic" was added and the organization became L'Association Litteraire et Artistique Internationale, a title by which it is still known.

1882 meeting this Association adopted a resolution stating "that the need for the protection of intellectual property was the same in all countries, and that complete satisfaction of this need could only be obtained by the constitution of 'a union for literary property'...."[2/]

In 1884, the Swiss Federal Council convened a diplomatic conference at Berne, and the third session of the conference adopted the text of an international convention for the protection of literary and artistic works in September 1886.[3/]

This Convention reflects many of the most deeply held desires of authors and artists for recognition of their economic rights in their creations. The authors' objectives were both simple and radical: that recognition of copyright in favor of authors "must be made part of the legislation of all civilized countries;" that the recognition of copyright among states not be based upon reciprocity; that no discrimination in rights be permitted between foreign and national authors; that the imposition of formalities for the "recognition and protection" of copyright in foreign works be curbed; and, "that all countries adopt uniform legislation for the protection of literary and artistic works." (Emphasis added).[4/]

The 1886 Convention contains two basic principles that are still a basic part of the Berne Convention:

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2. S. Ladas, The International Protection of Literary and Artistic Property 75 (1938) (hereinafter "Ladas").

3. The original text was signed by ten countries: Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland, and Tunisia.

4. Ladas at 72.

1. The Union Concept. The contracting states constituted themselves into a Union for the protection of the rights of authors in their literary and artistic works. In forming this Union, the original members of the Berne Convention "sought to underline that it was not a matter of merely negotiating a contractual agreement between a number of countries, the duration of which depended on the continuing participation of all the signatories, but one of creating a genuine 'society' of states, able to go on existing even after the departure of one or more of them, open to all countries of the world and capable by periodic revision, of keeping pace with juridical, technical and economic change."5/

2. Principle of National Treatment. One of the major advances made in the 1886 Convention was the adoption of the idea that authors who are subjects or citizens of any of the countries of the Union should enjoy in all other member countries the same protection for their works as those countries accord their own authors. This is the principle of "national treatment," also referred to as "assimilation of the foreigner to the national."

B. Successive Revisions of the Berne Convention.

Although primitive by today's standards, the 1886 Berne Convention included provisions such as the "union of states" and national treatment which remain cornerstones of the Convention today. During the one hundred years of its existence, the Convention has been revised five

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5. World Intellectual Property Organization, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) 9 (1978) (hereafter "Wipo Guide").

times in order to meet changing conditions, such as new technological developments, that may affect authors' rights. At least through the 1948 Brussels revision, the successive texts have generally improved and extended the rights accorded authors and copyright proprietors.

1. 1908 Berlin Act. 6/ The principal achievement of the Berlin Revision Conference was the prohibition of formalities as a condition of the enjoyment and exercise of rights under the Convention. The term of copyright protection was set for the life of the author plus fifty years, subject to different regulation by the law of each country. The Convention also extended the range of various kinds of literary and artistic works to be protected and clarified that all contracting countries were bound to afford protection by their law to all of these works. The Berlin Revision recognized the exclusive rights of authors of musical works to authorize the adaptation of these works and gave protection to the authors of cinematographic works. Translation rights were recognized for the life of the copyright without restriction. Photographic works were explicitly included.

2. 1928 Rome Act. This revision expressly recognized the moral rights of authors, giving them both the right to claim authorship, and the right to object to modifications of the work that prejudiced their honor and reputation. States are free to determine conditions of the exercise and safeguard of these moral rights. This revision also specifically recognized the right to authorize broadcasting of a work, but details of the right were left to national legislation.

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6. The Berlin Conference of 1908 worked the first major revision of the Berne Convention, but the first changes were made by an 1896 Paris Conference. This "Additional Act of Paris" made perfecting amendments regarding interpretation of the Berne Convention and firmly recognized the right of translation for a minimum term of ten years.

3. 1948 Brussels Act. This revision made mandatory the fifty year after the death of the author copyright term of protection as a minimum term of protection. It also added general improvements in copyright protection including: a special right of recitation; optional droit de suite, 7/ subject to reciprocity; and protection against communication by cable of the broadcast of the work if that broadcast is made by a body other than the original one. It recognized cinematographic works as a sui generis category, to which works produced by analogous processes were added.

4. 1967 Stockholm Act. The Stockholm Act created the World Intellectual Property Organization (WIPO) to administer the Union. It extended protection through assimilation of authors not nationals of a Union country but having their habitual residence in one of those countries to nationals of such a country and also established a "Protocol Regarding Developing Countries," which would have allowed developing countries broadly to limit the rights of translation and reproduction. This Act 8/ also gave explicit recognition to and provided special regulation of the right to authorize the reproduction of a work and provided other special

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7. This right to an interest in resales of works of art and manuscripts is entirely optional for member states and is available only on the basis of reciprocity. Article 14ter.

8. Because of its controversial Protocol, developed countries generally refused to accept the substantive provisions of the Stockholm Act, and the Act is significant primarily for the creation of WIPO, which replaced the International Bureau of the Berne Union (BIRPI) as the administrative organization (secretariat). The substantive provisions later came into force as part of the successful 1971 Paris Revision. The Protocol Regarding Developing Countries was modified to narrow the possible exceptions to exclusive rights. Since it is the provisions of the 1971 Paris Act that the United States must accept, this text is discussed separately in the next section of our statement.

rules for cinematographic works. 9/

C. Divergence of Berne and U.S. Copyright Law.

The Berlin revision largely coincided with the development and enactment of the 1909 United States Copyright Act. Although Congress, the Administration and many interests groups were aware of the Berne revision proceedings, the Copyright Act of March 4, 1909, which was to be the basic copyright law of the United States for almost 70 years, pursued policy lines at odds with major provisions of the Berlin text.

The decisions made in Washington in 1909 and in Berlin in 1908 were to set the United States and the Berne Union upon separate paths, originally based upon a differing approach to copyright duration and formalities. With the revision of Berne at Rome (1928) and Brussels (1948), and the failure of several United States revision efforts aimed at permitting United States adherence to Berne, the paths would not even begin to converge in material ways until the enactment of the 1976 Copyright Act.

D. Relationship of the Berne and Universal Copyright Conventions.

Under the auspices of UNESCO, and with United States interests as the primary motivating force, a second international copyright convention, the Universal Copyright Convention (UCC) was formed in the post-World War II era. 10/ This Convention was agreed upon in Geneva in 1952, and the

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9. I have given a brief summary of the successive revision texts of the Berne Convention not only for their historical significance, but also because of their practical importance. Different members of the Convention adhere to different texts, and their relations are governed primarily by the latest common text, if any. (Sometimes there is no common text, and each applies the version to which it has adhered.) Thus, Thailand is a member of the 1908 Berlin version. Canada and several other countries adhere to the 1928 Rome version.

10. The United States directed its energies to the major task of creating a new, worldwide multilateral copyright convention because it reached the

United States ratified the Geneva text and became a member of the UCC in 1955. It was revised once, at Paris in 1971, simultaneously with the Berne revision. The UCC has 79 adherents and provides significant protection for United States works abroad on the basis of national treatment and a few specific minimum requirements. Our membership in the UCC would be maintained even if the United States were to join the Berne Union.

The UCC was created with the full assistance of the founding members of the Berne Union. One of the signal, and crucial, achievements in developing the UCC was the agreement to "safeguard" -- that is, avoid any erosion in the level of protection -- the Berne Convention. The agreement is found in Article XVII of the UCC and its Appendix Declaration.

Article XVII of the UCC provides that the Universal Convention does not change any provisions of the Berne Union or membership in the Berne Union. This article together with its Appendix Declaration is known as the "Berne safeguard clause." Paragraph (a) of the Appendix Declaration provides a penalty against any country, a member of Berne on or after January 1, 1951, that withdraws from Berne and adheres to the UCC. The penalty is denial of UCC protection in Berne countries that belong to the

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conclusion that, at least temporarily, Berne Convention membership was no longer a realistic goal. As stated in the 1954 Senate Report dealing with adherence to the Universal Copyright Convention:

> [The United States] has found it impossible to subscribe to the [Berne Convention] *** because it embodied concepts at variance with principles of American copyright law. These concepts involved such matters as the automatic recognition of copyright without any formalities, the protection of the "moral" rights, and the retroactivity of copyright protection with respect to works which are already in the public domain in the United States.

Universal Copyright Convention, Report of the Senate Comm. on Foreign Relations on Executive M, S. Exec. Rep. No. 5, 83d Cong., 2d Sess. 3 (1954).

UCC. Furthermore, as long as the country remains in the UCC, it would be legally obligated to extend UCC protection to those Berne countries, but it would receive no protection from those states in return. In short, once you join Berne, you cannot denounce your Berne obligations without also losing UCC protection in Berne States. This powerful penalty was necessary to reassure Berne states that the UCC posed no threat to the protection guaranteed by Berne. At the 1971 Berne and UCC Revision Conferences, the "safeguard clause" was amended to allow developing countries to withdraw from Berne without losing UCC protection.

The second half of the "safeguard clause" provides that the Berne Convention shall govern the relations between members of Berne that also belong to the UCC. The UCC cannot be applied in those instances even if its application would result in greater protection for authors than Berne would.

The Berne safeguard clause enabled Berne states (especially the European countries) to become members of the UCC, and they joined to establish multilateral copyright relations with the United States and other non-Berne countries. UCC membership now exceeds Berne membership (79 to 76). In the 52 countries that are members of both Berne and the UCC, the United States enjoys Berne level protection through the front door of national treatment.

II. SUMMARY OF THE 1971 PARIS ACT

The present text of the Berne Convention to which the United States would adhere is that concluded at Paris in 1971. 11/ Apart from the

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11. Accession or adherence to earlier versions is closed; if we join, it must be on the basis of the 1971 Paris version. The previous high tide of United States efforts to join Berne occurred in 1931, when the House

special provisions for developing countries set forth in an integral appendix, the 1971 Act carries forward the generally favorable level of protection previously enjoyed by authors under the Berne Convention.

Ignoring for the time being administrative provisions, the Berne Convention today contains 20 Articles, defining the subject matter of protection under the Convention, setting out points of attachment with the Convention which give rise to the obligation to protect these works, establishing the rule of national treatment and the independence of copyright protection as among the countries of the Union from protection in the country of origin, enumerating certain minimum economic and moral rights of authors with respect to the utilization of their works, establishing specific opportunities to exempt certain uses from the exclusive rights guaranteed by the Convention, setting down special provisions taking account of the unique circumstances surrounding the creation and dissemination of motion pictures, and governing retroactive application of the Convention.

The substantive provisions of the Berne Convention cannot be accurately capsulized in a summary statement. Indeed, the meaning of many of the provisions of the Berne Convention cannot fully be found from a mere reading of the 1971 Paris Act. Copyright treaties simply do not exist in isolation from the domestic copyright laws of states party to such treaties. This is well-recognized in the case of the Universal Copyright

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passed implementing legislation and the bill died in the Senate because of a filibuster on an unrelated issue. At that time, we could have joined on the basis of the 1908 Berlin text. After 1931, that text was closed, and the Rome 1928 version introduced "moral" rights and forbade reservations. Until now, these obstacles proved impossible to overcome.

Convention (UCC), which contains few specific obligations as to rights, limitations, or the exercise or enforcement of copyright. The UCC stresses instead non-discriminatory national treatment. It should not be forgotten, however, that the same is true in part in the case of Berne.

The Berne Convention has three general types of provisions: 1) specific rules that guarantee rights to authors and proprietors; 2) rules that establish more general obligations, leaving the details to national legislation within specified limits; and 3) optional rules whose acceptance is left entirely to national law. Absent specific legislation, and depending upon domestic jurisprudence, rules that are susceptible of direct application could be given legal effect by adherence to the Convention under Article 36, depending upon the treaty acceptance process of a given country. The range of options open to a member of the Berne Union in implementing Convention obligations is reflected in the diversity of national legislative approaches within the framework of the Convention. Of the many ambiguous questions surrounding the application of copyright law to new technologies and changes in user and proprietary behavior in the marketplace, Berne may provide few answers on its face and much conflicting practice among the members of the Union.

With these caveats in mind, several generalizations about the substance of the 1971 Paris Act of Berne may be offered for more precise analysis.

Article 2(1) clarifies that, when referring generally to "literary and artistic works," the Berne Convention means "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression." The Convention contains an illustrative listing of such works, "painting," "architecture," "photographic works to

which are assimilated works expressed by a process analogous to photography," "illustrations," and "three dimensional works relative to geography, topography, architecture or science," to name but a few. As in the United States copyright law, the subject matter of protection under Berne is established with reference to the creative nature of a work, not its medium of expression or any particular technology of fixation.

The familiar provisions of section 103 of the United States copyright act concerning the protectability of compilations and derivative works are reflected in Articles 2(3) and (5) of the Berne Convention. Further, the extension of copyright protection to governmental or other official works is subject to the discretion of Union states under Article 2(4) of the Convention. Article 2(8) of the Convention expressly excludes from the scope of its obligations that of protecting by copyright "news of the day or ... miscellaneous facts having the character of mere items of press information." The rationale of this provision draws the familiar line between the non-protectability of facts, per se, as opposed to the protectability of particular original expressions of fact, containing "sufficient intellectual effort for them to be considered as literary and artistic works." 12/

The obligations of states within the Union to protect works depends upon certain eligibility criteria being satisfied. Minimum eligibility requirements are specified in Articles 3 and 4 of the Convention. Oversimplifying somewhat, Berne provides that the protection of the Convention applies to the published and unpublished works of authors who are nationals of a country of the Union; and to the works of non-Unionist

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12. Wipo Guide at 23.

authors first published in a country of the Union (including simultaneous publication in a Berne and a non-Berne country). For purposes of the first criterion, domiciliaries of Convention countries are treated the same as nationals.

The second criterion, that of first publication in a Berne Union country, is the basis upon which United States works long secured protection in states party to Berne before the creation of the UCC. Our copyright owners have used the device of simultaneously publishing works in the United States and the nearest Berne country market: Canada. This procedure has been commonly referred to as the "back door" to Berne. The "back door" to Berne is still used in Berne states that are not in the UCC. As noted earlier, the UCC gives us a front door right in 52 Berne-UCC states.

Formalities of a certain kind cannot be applied to works having a country of origin (generally the place of first publication) other than the country where protection is sought. The Convention by its terms does not govern protection for works in their country of origin. Therefore, formalities can be maintained for works in their country of origin.

The Berne Convention contains a number of articles establishing minimum terms of protection, in general and for specific works. As mentioned earlier, the Berne Convention adopted the minimum term of life of the author plus 50 years post mortem as early as 1908; yet, it became a mandatory requirement only in 1948. Special minimum terms of protection are provided for cinematographic works, anonymous and pseudonymous works, photographs and works of applied art insofar as they are protected as artistic works. For motion pictures, the minimum term is "50 years after the work has been made available to the public with the consent of the

author, failing such an event within 50 years from the making of such a work, fifty years after the making." The provision as to anonymous and pseudonymous works is structurally similar to section 302(c) of the United States Copyright Act, with the exception that the Convention's minimum term is 50 years from first publication or 100 years from creation. The minimum term of protection for works of applied art and photographs under Berne is 25 years from the making thereof.

The minimum economic rights of authors specified in the Berne Convention are those familiar to students of the copyright laws of most countries of the world, including countries outside of the Berne Convention: the exclusive right of translation; the exclusive right of reproduction; the right of public performance or recitation (which in Berne is divided basically into two broad categories -- broadcasting and non-broadcasting public performances); the right of adaptation, that is, to authorize the adaptation, alteration or arrangement of works; and the right to record musical works.

In addition to the specific minima, the Convention requires member states to accord national treatment to foreign works, thus prohibiting discrimination against foreign works and their authors.

The Berne Convention does not contain express recognition of the right of public distribution, in the fashion of section 106(3) of the United States copyright law, nor of the right of public display created by section 106(5) of the 1976 Copyright Act. The silence of the Convention on the right of public display probably reflects its relative novelty. The absence of specific rules as to the scope of distribution rights for all or

certain works may reflect the variable practices of states. Some contend that the distribution right is part of the reproduction right. Uniform rules on these important areas of copyright law and practice apparently do not exist.

As is the case with national copyright laws, the Berne Convention permits exceptions to exclusive rights. Berne permits exceptions permitting free quotations from publicly distributed works "providing that their making is compatible with fair practice and their extent does not exceed that justified by the purpose ...." [Article 10(1)]; and, special exemptions favoring the reproduction of articles on "current economic, political, or religious topics" are permitted under certain circumstances.

Union states are further allowed to "permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, providing such utilization is compatible with fair practice." [Article 10(2)]. And Union states are allowed, with respect to the exclusive right of reproduction,

> to permit the reproduction of such works in special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Article 9(2).

With respect to public performance rights other than broadcasting, and apart from specific exceptions such as Article 10(2) and 10bis, dramatic, dramatico-musical and musical works are accorded unqualified rights. However, "minor reservations" to non-broadcast public performances are tolerated among the states party to Berne, in accordance with a broad understanding reached during the Stockholm revision conference in 1967.

In the important area of public performance by broadcasting, the Berne Convention establishes a comprehensive right applicable to traditional broadcasting, wire diffusion, retransmission, rebroadcasting and public communication of broadcasts. Unlike the case of non-broadcast public performances, however, the Berne Convention permits the application of compulsory licenses in the case of the broadcasting right.

The Berne Convention also contains provisions authorizing states to legislate exemptions permitting ephemeral recording, essentially similar to the system adopted in section 112 of the 1976 Copyright Act.

With respect to the rights of authors of musical works to authorize the recording of their compositions, the compulsory license for making and distributing phonorecords of nondramatic musical works in the United States copyright law has long had its analog in the Berne Convention.

The Berne Convention has a number of interesting provisions relating to copyright in cinematographic works. They are recent, having been adopted at the 1967 Stockholm Conference, and put into effect through the 1971 Paris Act. To oversimplify a rather complex subject, the relevant

provisions of the Berne Convention attempt to define minimum rights and points of attachment for protection to cinematographic works with reference to the "author" of a film, while leaving to national legislation discretion to determine who such an author is.

Apart from the economic rights of authors in their works and permissible limitations upon such rights, the Berne Convention also contains the provisions known as "moral rights" which encompass a variety of specific interests authors have with respect to public utilization of their works, more in the nature of artistic and professional integrity than pure commerciality. The recognition and progressive elaboration of the moral rights of the author is and has long been one of the most distinctive features of the Berne Convention.

In fact, Article 6bis of the Convention does not necessarily exhaust the potential scope of so-called "moral rights" as recognized in states party to the Berne Convention. Some states include the right to first publish a work as a moral rather than economic right, or recognize the author's right to object to unfair or excessive criticism of his or her work, or the right of an author to withdraw a work from circulation (subject to compensation of authorized distributors). The Convention does not elaborate on the important question of assignability or waivability of moral rights by specific agreement.

The Convention establishes minimum obligations regarding protection of works in existence prior to the coming into force of the Convention, including works in the public domain. [Article 18]. This provision for retroactivity cuts two ways: it could affect protection for pre-existing United States works in other Berne countries, and restoration of protection for foreign works in the United States public domain for reasons other than expiration of the term of copyright.

It should be noted that the Berne Convention contains a number of provisions applicable to the special needs of developing countries which largely duplicate provisions found in the Universal Copyright Convention.

Finally, with three exceptions, the Berne Convention does not allow for any reservations as to particular obligations. Under Article 30(1), "ratification or accession shall automatically entail acceptance of all the provisions and admission to all the advantages of [the] Convention." The exceptions are: developing countries may make reservations in accordance with the Appendix (the special provisions regarding developing countries); a country may decline to admit the jurisdiction of the International Court of Justice; and a country may reserve, at least temporarily, the right to apply the ten year translation provision of the Additional Act of 1896. No other reservations are permitted.

III. RECENT DEVELOPMENTS AND THE EMERGING CONSENSUS FAVORING U.S. ADHERENCE TO BERNE

In the past few years there has been a revival of interest in getting the United States to adhere to the Berne Convention. This interest has been sparked by recent events, including the U.S. withdrawal from UNESCO, the increasing importance of copyright in trade negotiations with

countries that get Generalized System of Preferences (GSP) benefits and with members of the General Agreement on Tarriffs and Trade (GATT), the introduction of specific legislation in both houses of Congress, the work of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, and the Roundtable Discussions on U.S. adherence held in Geneva last fall. 13/ It is perhaps of value at this point to examine briefly past U.S. efforts to adhere to Berne in light of the barriers that prevented Congress from taking the final step and to ask ourselves whether or not adherence is more viable now.

A. Past U.S. Efforts to Join Berne

The formal adoption of the Berne Convention occurred over 100 years ago on September 9, 1886; the United States chose not to participate. Although the United States adopted the first federal Copyright Act in 1790, our law did not provide any protection of foreign works until 1891.

Based on the 1891 Act the United States entered into a series of bilateral arrangements with other countries. At the beginning of the twentieth century, Berne members encouraged the United States to join. In 1909, however, the United States revised its copyright law and did not make it compatible with Berne. We continued the practice of proclaiming bilateral copyright relations with foreign countries that complied with the general requirements of U.S. copyright law, including notice, deposit, registration, and manufacture in the United States.

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13. These discussions were held in Geneva on November 25 and 26, 1987. They were organized by the World Intellectual Property Organization (WIPO) at the request of the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary. It is our understanding that a summary transcript of these discussions has been made part of the record of Judiciary Committee hearings in both the House and the Senate.

After World War I the foreign market for United States works began to grow. A big effort was made to revise U.S. law and make it compatible with Berne all during the 1920's and 1930's. This effort was probably doomed when the 1928 Rome Revision of Berne removed the possibility of joining Berne with reservations and added moral rights as a new obligation. The Senate came close on April 19, 1935, when it voted to ratify Berne; however, this vote was reconsidered on April 22, 1935, and the Convention was put back on the Executive Calendar to await action on a bill to amend the United States copyright law.

The foreign market continued to expand after World War II. It was now clear the U.S. copyright law had moved on a different path than Berne, but it was also clear that we needed better international copyright relationships. The United States led a movement to form a new international copyright convention under the auspices of the United Nations Educational, Scientific, and Cultural Organization (UNESCO). The result was the Universal Copyright Convention (UCC). Representatives of the United States worked with those of other countries to establish the UCC, and the United States formally ratified the UCC on December 6, 1954. 14/

In 1976 we revised the copyright law and came closer to Berne standards without removing all of the barriers. Since that revision, the manufacturing clause has been eliminated from U.S. copyright law. As we are once again involved in a concentrated effort to adhere to Berne, U.S. copyright law has fewer barriers than ever before, and foreign markets for

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14. For a more detailed discussion, see Goldman, The History of U.S.A. Copyright Law Revision from 1901 to 1954, Copyright Law Revision Study No. 1, Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary, 86th Cong., 1st Sess. (Comm. Print 1960) See also id., Study No. 32, Bogsch, Protection of Works of Foreign Origin 86th Cong. 2d Session (Comm. Print 1961).

U.S. copyrighted works have continued to expand. The effort to join Berne may actually succeed because there is more support within the greater copyright community than at earlier times when Congress considered ratifying the Berne Convention.

B. Renewed Interest In Joining Berne

1. Withdrawal from UNESCO. The United States had an influential role in the development of the UCC and has been a member since 1955. In the last decade there has been some dissatisfaction with the politicizing of UNESCO, the organization within the United Nations under whose auspices the UCC was created. In 1983 growing discontent with UNESCO funding caused the United States to formally withdraw. We still belong to the UCC and actively participate at copyright meetings. We do not participate in UNESCO budgetary meetings. We are an invited guest at WIPO meetings on copyright, but do not have any direct influence since we are not a member of Berne.

2. Renewal of European Encouragement. Coincident with the 100th Anniversary of Berne, representatives of Berne and international coyright experts have encouraged the United States to join Berne. On May 16, 1985, Dr. Arpad Bogsch, the Director General of the World Intellectual Property Organization (WIPO) appeared before the Senate Subcommittee on Patents, Copyrights and Trademarks and testified on the importance of international efforts to preserve copyright. He observed that "The Berne Convention is a coalition of states determined to ... respect ... copyright. But the strongest potential member ... the United States of America, is not a member ...." He also assured the Subcommittee that the United States would not have to change the level of copyright protection it currently provides

in order to join. As Director General of WIPO, Dr. Bogsch spoke for the countries that now belong to Berne and said that since they want a high level of copyright protection, they would welcome the accession of the United States as a strong ally. 15/

3. Round-table Discussions. The testimony at the 1985-1986 Senate hearings was definitely pro-Berne. U.S. reservations about whether it is necessary to change American law have generally been soothed by the responses of international copyright experts. The general international position appears to be that there is no need for the United States to make radical changes in its law. This is definitely the position that Dr. Bogsch took before the Senate Subcommittee.

At the request of the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Subcommittee on the Judiciary, WIPO organized a Roundtable Discussion on United States adherence to the Berne Convention in Geneva on November 25 and 26, 1987. At these discussions international copyright experts addressed four of the main issues that have concerned U.S. legislators:

(1) whether existing U.S. law is compatible with the Article 6 bis moral rights provision;

(2) whether Berne is self-executing;

(3) the extent to which U.S. formalities are a barrier; and

(4) the Berne Convention and new technologies.

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15. U.S. Adherence to the Berne Convention: Hearings Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 99th Cong. 1st and 2d Sess. 9-12 (May 16, 1985; April 15, 1986) [Hereafter Senate Hearings on Berne].

Both Dr. Bogsch and other international copyright experts have emphasized that the Berne philosophy is fair and flexible enough for the Convention to accommodate different legal philosophies. There are already several common law countries in Berne, including the United Kingdom, that do not appear to offer any greater protection of moral rights, for example, than that afforded under the U.S. system.

There was some divided opinion as to whether the U.S. registration and deposit systems were compatible, but the prevalent opinion appears to be that both are satisfactory as long as they are not a condition of copyright.

4. GATT Considerations. For some time now the United States has been trying to get countries that do not protect U.S. works but receive benefits based on GATT's Generalized System of Preferences (GSP) to enact effective copyright measures. This is done during trade negotiations through a carrot and stick approach. Our trade negotiators now consider intellectual property protection in making decisions on GSP benefits. 16/ Since the level of copyright protection that the U.S. government would like these countries to provide for U.S. works is that found in Berne, U.S. adherence to Berne would be very helpful in these negotiations. 17/

5. Leadership Role of the United States. The year 1990 will be the bicentennial of the first federal copyright act in the United States; it is possible that the next decade will see proposals to revise Berne. It seems appropriate that as this historic date nears, the United States

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16. Id. at 137-139.

17. Id. at 135-139, testimony of C. Michael Hathaway, Deputy General Counsel, U.S. Trade Representative.

should carefully consider the pros and cons of joining Berne now so that we can take an active role when the premier multilateral copyright convention is revised to accommodate the challenges copyright will face in the 21st century.

It is clear from the number of organizations that have come forward to testify in support of Berne that the protection of intellectual property rights including copyright is an important consideration for the American economy. For years the U.S. has tried to get higher Berne protection for our works through simultaneous publication in a Berne country, the so-called "back door" to Berne protection. This has seemed increasingly hypocritical to some as, in various trade copyright negotiations, we try to get other countries to give us Berne-level protection. By doing one thing and saying another, we give mixed signals to foreign governments from whom we are trying to get assurance of high level Berne protection. Undoubtedly America is one of the leading exporters of copyrighted works; active leadership in one or both of the multilateral conventions is necessary in order to ensure that these works are protected adequately.

IV. DIFFERENCES IN HOUSE AND SENATE VERSIONS OF THE BERNE CONVENTION IMPLEMENTATION ACT OF 1988

On the majority of issues concerning implementing legislation, the House and Senate versions of the Berne Convention Implementation Act of 1988 are identical. In one significant area - that of registration and recordation - there is divergence.

Under Article 5(a) of the Berne Convention formalities conditioning the exercise or enjoyment of copyright are prohibited. This provision has raised questions concerning some of the provisions relating to registration and recordation. More specifically, section 411(a) requires copyright registration be sought before copyright infringement actions are filed in federal court. Likewise, section 205(a) requires a copyright proprietor who secures his rights through transfer to record the transfer in the Copyright Office before initiation of an infringement action in federal court. Whether these requirements are consistent with the obligations of the Berne Convention has generated a spirited debate.

The Copyright Office believes both sections 411(a) and 205(d) are Berne compatible. Under the 1976 Copyright Act, registration is not a mandatory condition of the existence of copyright. Copyright protection in a work exists independently of registration with the Copyright Office. The requirement that copyright claimants seek registration before the filing of a copyright infringement action is procedural in nature. If registration is denied, the copyright owner has the statutory right under 17 U.S.C., section 411(a) to bring an action directly against an alleged infringer. The copyright owner is not denied relief; the right can be enforced. Therefore, section 411(a) is not prohibited by Berne; it is not a condition of the "enjoyment or exercise" of the copyright as understood by the

members of the Berne Union. That reasonable "procedural" requirements such as section 411(a) are permitted by Berne is amply supported by the definitive World Intellectual Property Organization (WIPO) Guide to the Berne Convention. 18/

The House agreed with the position of the Copyright Office, and proposed no changes in sections 411(a) and 205(d). The House Report acknowledged that there were divergent views on the issue. 19/ However, "(c)onsistent again with the minimalist approach, H.R. 4262 proceeds upon the assumption that section 411 of the Copyright Act should not be changed since it is not clearly prohibited by Article 5(2) of the Berne Convention. The requirement that registration occur as a precondition to a lawsuit is procedural in nature and does not in any sense lead to a 'loss of copyright.' .... It is the view of the Committee that any doubt on this issue should be resolved in favor of retaining section 411 of the Copyright Act because the provision is in the public interest. .... Copyright registration promotes efficient litigation practices, to the benefit of the courts and the public as well as the parties in the lawsuit. Registration narrows the issues that must be litigated and, since it pertains to proof of ownership, assists the courts in resolving the underlying copyright dispute." On May 10, 1988, the House passed the Berne Convention Implementation Act of 1988 by voice vote of 420 yeas. 20/

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18. See the discussion of Article 5(2), at page 33: "The word 'formality must be understood in the sense of a condition which is necessary for the right to exist -- administrative obligations laid down by national law, which, if not fulfilled, lead to loss of copyright."

19. H.R. Rep. No. 100-609, 100th Cong., 2d Sess. p. 40-44 (1988).

20. 134 Cong. Rec. D560 (daily ed. May 10, 1988).

To date, the Senate Judiciary Committee has a different view of the issue. 21/ The Committee believes "section 411(a) in its current form is incompatible with Article 5(2) of Berne ... since (Article 5(2)) prohibits formalities as preconditions for 'the enjoyment and the exercise' of copyright. The author of an unregistered work does have a copyright on his work under U.S. law. But his 'enjoyment and exercise' of that copyright is severely limited, or perhaps non-existent, if he is barred access to the only forum in which he may seek to prevent, or to be compensated for, unauthorized reproductions or other infringements of the work." Furthermore, the Senate Judiciary Committee believes the elimination of the section 411(a) requirement would have a minimal impact on the number of works registered, and that retention of section 411(a) might encourage retaliation by foreign nations.

Between the positions of the House and the Senate Judiciary Committee there is room for compromise. Under the compromise, a so-called two-tiered system would be established whereby the section 411(a) requirement would be maintained for works of U.S. origin, while works of foreign origin eligible under the Berne Convention would be exempt. Under this system, foreign Berne Union claimants would have the option of registering first with the Copyright Office, or proceeding directly to federal court. If the foreign claimant chose to bypass the registration system, he or she would forfeit the prima facie evidentiary weight of the certificate of registration under section 410(c), and statutory damages and attorney's fees under section 412. The Copyright Office supports this compromise.

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21. S. Rep. No. 100-352, 100th Cong., 2d Sess. 13-26 (1988).

V. CONCLUSION

In conclusion, after a century of soul-searching and growth, a consensus appears to be emerging that the United States should now adhere to the Berne Convention. Four strong arguments form the underpinnings of this conclusion. First, in order to maintain our leadership role in international copyright relations, U.S. adherence to the Berne Convention is important. For over 100 years the Berne Convention has represented the world standard for copyright protection. The Convention has proved to be a dynamic agreement that has adapted to a dramatically changing world environment while remaining faithful to established principles that ensure high levels of copyright protection. As the world's largest exporter of copyrighted goods, the United States should join the Berne Union and help make a concerted effort to resolve the enormous problems facing the entire world copyright community.

Second, adherence to the Berne Convention will enhance the United States' political credibility and strengthen its position for negotiating multilateral and bilateral trade agreements involving intellectual property. Were the United States a Berne signatory, we could more adamantly argue that Berne standards represent the internationally recognized minimum standards of protection for copyright. The U.S. Trade Representative sees this advantage as especially important.

Third, by adherence to Berne, United States authors will gain increased copyright protection both internationally and domestically. United States authors will immediately receive high level copyright protection in the 24 Berne nations 22/ that are not party to the Universal

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22. See Appendix A for the list of countries.

Copyright Convention, without having to engage in the cumbersome procedures necessary for "back door" protection under Berne. In addition, United States membership in Berne would facilitate enforcement of copyright of United States authors in Berne nations.

Fourth, only relatively minor changes to the Copyright Act of 1976 are necessary for the United States to meet the standards of protection required by the Berne Convention. The Berne Convention Implementation Act of 1988 enjoys widespread support among the affected interests. Given this widespread support, it is unlikely that any of the necessary changes will adversely affect American interests.

APPENDIX A [23]

Nation	Basis for Copyright Relations Today
Benin	Unclear [24]
Burkina Faso	Unclear
Central African Republic	Unclear
Chad	Unclear
Congo	Unclear
Cyprus	Unclear
Egypt	None [Adheres to Geneva Phonograms Convention]
Gabon	Unclear
Ivory Coast	Unclear
Libya	Unclear
Madagascar	Unclear
Mali	Unclear
Mauritania	Unclear
Niger	Unclear
Romania	Bilateral treaty (1928)
Rwanda	Unclear
South Africa	Bilateral treaty (1924)
Surinam	Unclear
Thailand	Bilateral treaty (1921)
Togo	Unclear
Turkey	None
Uruguay	Buenos Aires Convention; Geneva Phonograms Convention
Zaire	None [Adheres to Geneva Phonograms Convention]
Zimbabwe	Unclear

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23. This list is drawn from a comparison of Berne and UCC membership as of January 1, 1987, as printed in Copyright (January 1987) at 6-8 and 12.

24. "Unclear" relations are those in which a state has attained independence since 1943, and may or may not be honoring obligations incurred under its former political status. For registration purposes the Copyright Office treats "none" and "unclear" countries the same: registration is ordinarily refused.

STATEMENT OF

JOHN K. UILKEMA, CHAIRMAN

SECTION OF PATENT, TRADEMARK AND COPYRIGHT LAW

ON BEHALF OF

THE AMERICAN BAR ASSOCIATION

BEFORE

THE COMMITTEE ON FOREIGN RELATIONS

UNITED STATES SENATE

100TH CONGRESS, SECOND SESSION

ON

UNITED STATES ADHERENCE TO THE BERNE CONVENTION

JULY 11, 1988

Mr. Chairman and members of the Committee: I am John Uilkema, Chairman of the American Bar Association's Section of Patent, Trademark and Copyright Law. I am appearing at the request of our ABA President, Robert MacCrate, on behalf of the Association.

We appreciate this opportunity to again express the American Bar Association's support for adherence by the United States to the Berne Convention for the Protection of Literary and Artistic Works.

In the words of ABA President Robert MacCrate, "United States adherence to the Berne Convention is the most important international copyright issue facing the United States and the American copyright community today -- particularly American authors and copyright proprietors".

Growing support for the United States to join Berne, especially during the last several years, has been evident by the very acts of Congress itself -- e.g., the enactment of the 1976 Copyright Act, which went a long way toward making our copyright law compatible with Berne, and phasing-out of the incompatible Copyright Manufacturing Clause (i.e., 17 USC 601).

The support for Berne has been increasing for several

reasons. Among the more significant of these are the following:

First, while the United States is a signatory to the Universal Copyright Convention (UCC), Berne adherence will regularize the United States' copyright relations with an additional twenty-four nations that adhere to Berne but not the UCC.

Second, Berne adherence should result generally in increasing the international protection available to the United States copyright proprietors, which is particularly important as international piracy has become a significant problem.

Third, Berne adherence will better fulfill the responsibility of the United States as a leading originator of copyrighted works to promote international comity and a unified system of copyright throughout the world -- particularly since the United States withdrawal from UNESCO (i.e., the secretariat for the UCC) will likely mean a significantly diminished voice in the UCC.

Fourth, we will no longer be subject to the justifiable accusations of hypocrisy, and to possible

retaliation, from Berne nations who resent our "free ride" on their Convention through so-called "back door" simultaneous publication practices.

Fifth, Berne membership will strengthen the ability of the United States in future bilateral and multilateral negotiations to negotiate for the inclusion of the higher Berne standards of copyright protection. For example, the United States would like to have the high Berne standards included in a new GATT intellectual property code now the subject of negotiations in the GATT Uruguay Round, but cannot credibly urge Berne-level protection while we ourselves are not members of Berne.

Accordingly, for all of these reasons, we believe that it is absolutely essential for the protection of American works in the markets of other countries for the United States to become a member of this major International Convention.

We are satisfied that a minimalist legislative legislative approach -- i.e., doing only so much as is necessary to render the U.S. law compatible with Berne -- is appropriate. This is the approach taken by the House and the Senate in H.R.4262 and S.1301, respectively.

An example of whether more should be done came into issue early during the legislative process in connection with the question of whether moral rights exist in the United States sufficient to comply with Berne requirements. The answer was clearly "yes" -- and, accordingly, we may fairly conclude that it is not necessary in the Berne legislation to change our law with respect to moral rights. Nor will any such change concerning moral rights be effected simply by virtue of our adherence, in view of the clear language in the Bills on this point and the fact that Berne is not a self-executing treaty.

Whether greater or lesser moral rights per se should be the subject of legislative consideration in the United States is a question that is separate and apart from the Berne adherence compatibility question. It may be taken up by the Congress at another time apart from the Berne adherence question.

Our knowledge about the content in the aforementioned pending House and Senate Bills, as well as our understanding of fine-tuning type amendments agreed to by the House and Senate Judiciary Committees to meet the minimalist legislative requirements for compatibility with Berne, make it possible for us to enthusiastically

endorse the pending Berne enabling legislation as well as United States adherence to Berne.

The policy-making House of Delegates of the American Bar Association on February 18, 1987, adopted the following resolution aimed at prompting United States Government action to improve the level of intellectual property protection obtainable in foreign countries:

> RESOLVED, that the American Bar Association approves in principle, and favors enactment of legislation to permit, adherence by the United States to the Berne Convention for the Protection of Literary and Artistic Works.

This resolution evidences support at the highest level in the American Bar Association for a strong effort by the United States Government to effect Berne adherence. Although the resolution is not specific as to the legislative content necessary for adherence, we believe and urge that the issue of compatibility be viewed in a realistic, balanced, minimalist fashion, as we believe has already been done by Congress in its work on the enabling legislation, while taking into account variations in the actual practices of Berne members.

Moreover, as stated in an earlier letter to Ambassador Yeutter, United States Trade Representative, "the American Bar Association fully supports the current GATT initiative on intellectual property". A copy of this letter is enclosed for your convenience.

This expression of American Bar Association support for a GATT intellectual property code, along with the Association's support for Berne adherence as expressed in this letter, makes it clear that the American Bar Association favors the development of copyright standards in a GATT code, based on the high levels of protection in the Berne Convention. Adherence to Berne will greatly aid in achieving this result.

We thank you again for the opportunity to appear before your Committee to present these views in support of adherence by the Unites States to the Berne Convention for the Protection of Literary and Artistic Works.

GOVERNMENTAL AFFAIRS OFFICE ABAnet 148
DIRECTOR Robert D. Evans ABAnet 148
STAFF DIRECTOR FOR GOVERNMENTAL LIAISON Craig H. Gould ABAnet 148
STAFF DIRECTOR FOR BAR LIAISON Steven J. Dimeoli
STAFF DIRECTOR FOR MEMBER LIAISON Irene B. Emsellem
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AMERICAN BAR ASSOCIATION Governmental Affairs Office
1800 M Street, N.W.
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(202) 331-2200

June 22, 1987

The Honorable Clayton Yeutter
United States Trade Representative
Executive Office of the President
600 - 17th Street, NW
Washington, DC 20506

Re: GATT Agreement on Intellectual Property

Dear Ambassador Yeutter:

I am writing to you on behalf of the American Bar Association to express the Association's strong support for the United States' effort to obtain an intellectual property agreement within the General Agreement on Tariffs and Trade (GATT).

As you are well aware, the lack of adequate and effective protection of intellectual property in certain countries has become a major cause of international trade distortions. Losses to worldwide industry as a result of counterfeiting (trademark copying) and piracy (patent and copyright infringement) abroad have been extensive and are growing.

The costs of innovation, production development and marketing have increased over the years and are continuing to grow. If each succeeding generation of products, processes and services is to be developed, it is necessary that innovators be able to recover these costs as well as a return on their investment. Counterfeiters and pirates do not face similar costs as they take a free ride on the innovator's work and thus are often able to displace legitimately-produced goods and works from international markets. The result is that certain industries are finding it increasingly difficult to obtain an appropriate economic return on their investment, which will inevitably lead to a slowing down of technical progress and its benefits to everybody.

Even developing countries can be injured by extensive counterfeiting and piracy. The financial losses suffered by patent and copyright holders from such unfair

activities make it more difficult to generate the investment capital that might contribute to the economic progress of the developing countries. Further, counterfeiting and piracy inhibit local commercialization of products and development of local industries that require an adequate period of exclusivity to recover initial costs. Thus, the industrial, intellectual and artistic creativity to be found in the developing countries may be left underutilized.

Recognizing these problems, on February 16, 1987, the policy-making House of Delegates of the American Bar Association adopted two resolutions aimed at prompting U.S. Government action to improve the level of intellectual property protection obtainable in foreign countries. These resolutions are as follows:

> RESOLVED, that the American Bar Association supports in principle administrative action by the Federal Government to improve the level of intellectual property protection obtainable in foreign countries by United States citizens and, specifically, supports the initiation of proceedings by the Office of the United States Trade Representative to secure adequate and effective levels of protection in countries which trade with the United States.
>
> RESOLVED, that the American Bar Association favors the government of the United States of America taking appropriate measures, consistent with other concurrent bilateral and multilateral initiatives for the protection of intellectual property rights, to (i) insure that the upcoming round of multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade ("GATT") will consider the lack of adequate and effective protection for intellectual property rights to be a barrier to trade, (ii) press, in such negotiations, for the early conclusion of a code such as the pending draft GATT Code on Measures to Discourage the Importation of Counterfeit Goods, and (iii) seek actively within GATT to negotiate and conclude codes and agreements to deal more generally with ineffective and inadequate international protection for intellectual property rights.

These resolutions evidence support at the highest level in the American Bar Association for a strong effort by the United States government to obtain an effective GATT agreement on intellectual property in the upcoming round of negotiations. Although the resolutions of the Association are not specific as to the form of agreement, you will note that the second resolution does

contemplate the negotiation of intellectual property codes. Such codes, which would establish rights and obligations among the signatories, would facilitate the negotiations since they would enable countries with a common interest in eliminating trade distortions to enter expeditiously into agreement. It has been suggested that conducting the negotiations within the narrow context of a code, as contrasted to amending the GATT, would reduce the problem of trade-offs unrelated to intellectual property issues.

Whatever may be the appropriate negotiating strategy and form of agreement, the American Bar Association fully supports the current GATT initiative on intellectual property and supports your efforts to bring it to a successful conclusion.

Sincerely,

Robert D. Evans

Robert D. Evans

6203P

cc: Mr. William Marshall Lee, Chairman
Section of Patent, Trademark and Copyright Law
Mr. Robert S. Rendell, Chairman
Section of International Law and Practice

COALITION FOR ADHERENCE TO BERNE
CAB
311 FIRST STREET, N.W., SUITE 500
WASHINGTON, DC 20001
202/737-8888

July 11, 1988

The Honorable Claiborne Pell
Chairman
Committee on Foreign Relations
U. S. Senate
Washington DC 20510

Dear Mr. Chairman:

The Coalition for Adherence to Berne (CAB) commends you and members of the Foreign Relations Committee for the timely nature of today's hearing which recognizes the importance of U.S. adherence to the Berne Convention.

The CAB is a group of trade associations and companies that have formed together to encourage legislation needed for the United States to adhere to the Berne Copyright Convention. It is a broad-based coalition representing the copyright-based industries such as the computer software, book publishing, motion picture, music, record, and toy industries, consumers and users of copyrighted material and other companies and associations concerned with improving the protection of, and international trade in, U.S. intellectual property generally.

The Berne Copyright Convention is the first (signed in 1886) and the most comprehensive international treaty governing the protection of copyrights around the world. As of 1986, seventy-six nations were members of Berne including all developed countries except for the United States, the Soviet Union and the People's Republic of China. The United States is currently a member of the Universal Copyright Convention which, while establishing for this country copyright relations with much of the rest of the world, no longer provides an adequate basis for ensuring full protection for, and therefore increased trade in, U.S. copyrighted films, books, records and tapes, computer software and other creative works embodying or manifesting the new technologies.

We urge the Committee to take swift action in recommending U.S. adherence to Berne for the following reasons:

1. The current U.S. campaign to combat worldwide piracy will be strengthened by U.S. adherence to the Berne Convention. Recent improvements in intellectual property protection in Korea, Taiwan and Singapore -- and prospectively in other countries -- are the result of an aggressive bilateral U.S. strategy. Incorporation of intellectual property in the GATT (General Agreement on Tariffs and Trade) is a cornerstone of the U.S. multilateral trade strategy. U.S. absence from Berne is a significant impediment to full implementation of these strategies.

   o U.S. adherence to Berne will enhance the credibility of U.S. trade

negotiations. The U.S. cannot credibly urge other governments to improve their protection of intellectual property by adopting Berne-level standards of protection if the U.S. itself does not belong to the premier copyright convention. If we are successfully to complete the negotiation of a GATT agreement, it is important that the U.S. demonstrate that it is willing to obligate itself to the terms of the international agreement which has the highest level of protection.

- o U.S. adherence to Berne will increase the chances for a successful conclusion of the GATT negotiations on intellectual property. It will be difficult for U.S. negotiators to adopt the highest levels of copyright protection if the U.S. is unwilling to join the convention in which those levels are found. Adherence to Berne will permit the U.S. to argue aggressively for acceptance of the fundamental principles of copyright protection embodied in Berne and to pursue a similar approach with other areas of intellectual property (i.e., patents, trademarks, etc.) where current international standards are clearly inadequate.

2. U.S. adherence will reduce the uncertainty of protection for U.S. copyrighted works in foreign markets and promote continued contribution of U.S. copyright industries to a positive trade balance. Copyright industries in the U.S., the world's largest exporter of copyrighted works, earn billions of dollars annually in foreign countries, thus helping to reduce our huge trade deficits. These worldwide interests are critically dependent on strong international copyright protection. Continued absence of the U.S. from the Berne Convention potentially jeopardizes this important income stream at a time when the trade deficit is a major problem and U.S. industry is facing increasing international piracy. New markets such as the People's Republic of China -- which is contemplating joining the Berne Convention -- are especially important.

- o Adherence will give the U.S. direct copyright protection for the first time in the 24 countries, such as Egypt and Turkey, that belong to Berne but not to the Universal Copyright Convention (UCC) to which the U.S. belongs. Some of these countries are centers for piracy of U.S. works. Berne membership will eliminate the current requirement that U.S. copyright owners publish their works simultaneously in a Berne country to enjoy protection in these 24 countries.

- o The "free ride" of simultaneous publication is, in fact, not free. It is available only to authors, composers and artists who can afford the intricate procedures for publishing in both the United States and in a Berne signatory country. Even those who can afford simultaneous publication find that the costs are onerous. One company alone spends an additional $10 million annually to meet this requirement. Simultaneous publication is difficult to accomplish administratively and the failure to publish properly in unfamiliar markets can be very costly, because it can result in exposing U.S. works to piracy. Furthermore, documentary and evidentiary difficulties in establishing

that a work has been simultaneously published in a Berne country substantially increase the cost and uncertainty of litigation, and provide a virtually automatic defense to pirates in a criminal or civil proceeding.

- o The protection that U.S. works now receive as a result of Berne can come to an end at any time. Any Berne signatory can terminate the "free ride" that it may now permit for U.S. works through the "back door" of simultaneous publication in the United States and in a Berne member country. The levels of protection for a U.S. work may become problematic even in countries that also belong to the Universal Copyright Convention, since high levels of protection for U.S. works under local laws derive from adherence to Berne.

3. U.S. adherence to the Berne Convention would give it a voice and a veto in an organization that will increasingly be dealing with important questions that affect the competitiveness of U.S. copyright industries well into the twenty-first century. Contemplation of the establishment of another international forum for intellectual property issues in the GATT has created a new and welcome level of receptivity to change in WIPO (the World Intellectual Property Organization), which administers the Berne Convention, and in its member countries. The U.S. must become a Berne member to take full advantage of the opportunity to press for higher levels of protection worldwide and to resist any attempts to weaken Berne's fundamental standards.

4. If the GATT negotiations on intellectual property fail and the United States rejects adherence to Berne, many Berne countries might close the "back door" to protection. Should this happen, the United States could wind up in the worst of all possible worlds. U.S. international copyright relations would then be set back to a level not seen since the end of World War II, when the U.S. began to come out of its isolationist shell and recognize the substantial stake in foreign markets for its copyrighted works and the need to exercise leadership in the international copyright community.

As you may know, the implementing legislation needed to join the Berne Convention passed the House of Representatives on May 10 by a vote of 420-0. The Senate is expected to pass similar legislation very soon.

Now that Congress has demonstrated strong bipartisan support by making the necessary changes in our copyright law to conform to Berne standards, we urge you and members of the Committee to recognize that it is clearly in the national interest to join the Berne Convention and we ask that you recommend ratification at the earliest possible date.

Finally, we ask that this statement and a list of coalition members be included as part of the hearing record.

Sincerely,

Members of the Executive Committee

James E. Ingram, Director, Government Relations
IBM Corporation

William L. Keefauver, Corporate Vice
President - Law
AT&T

Manfred Kuehn, Senior Vice President and
General Counsel
BMG Music (Formerly RCA-Ariola International)

Thomas Lemberg, Vice President and General
Counsel
Lotus Software

Larry Levinson, Senior Vice President
Gulf & Western (for Paramount Pictures and
Simon & Schuster)

Peter Nolan, Vice President - Counsel
The Walt Disney Company

Don Robbins, Vice President and General
Counsel
Hasbro Toy Company

Richard Rudick, Vice President and General
Counsel
John Wiley & Sons, Inc.

CAB SIGNERS

ADAPSO
American Electronics Association
American Film Marketing Association
Association of American Exporters and Importers
AT&T
BMG Music (Formerly RCA-Ariola, Intl.)
California Council for International Trade
Computer and Business Equipment Manufacturers Association
Consumers for a Sound Economy
Digital Equipment Corporation
Elsevier, Science Publishing Co., Inc.
Gulf & Western (Simon & Schuster
Paramount Pictures)
Hevlett-Packard Company
Hasbro Toy Company
Hudson Hill Press
IBM Corporation
Information Industries Association
Intellectual Property Committee
Intellectual Property Ovners
John Wiley & Sons, Inc.
Lotus Software
Motion Picture Association of America
National Association of Manufacturers
Texas Instruments Incorporated
Training Media Distributors Association
Walt Disney Studios

HARCOURT BRACE JOVANOVICH, INC.

88 JUN -9 PM 2:42

1666 CONNECTICUT AVENUE, N.W., WASHINGTON, D.C. 20009 TELEPHONE: 202-387-3900

MARSHA CAROW
VICE PRESIDENT

June 8, 1988

The Honorable Claiborne Pell, Chairman
Committee on Foreign Relations
U.S. Senate
335 Russell Building
Washington, D.C. 20510

Dear Mr. Chairman:

The United States Senate will shortly have before it an important opportunity -- to enact legislation enabling the U.S. to adhere to the Berne Convention for the Protection of Literary and Artistic Works. The full Senate Judiciary Committee, the full House Judiciary Committee, and the entire U.S. House of Representatives (by a vote of 420 to 0) has acted to move forward legislation to bring the U.S. into membership in this the most important copyright treaty in the world. They have done so with the full support and encouragement of the Administration.

Support for Berne adherence is equally strong in the private sector. Harcourt Brace Jovanovich is only one of the many publishers who view Berne adherence as a crucial element in this nation's worldwide efforts to combat piracy and improve protection of our intellectual property abroad. Publishers are joined in their support of Berne by the computer industry, the motion picture industry, others from the high tech and intellectual property communities, as well as representatives of creators, educators, libraries and copyright scholars.

Enhanced protection of U.S. intellectual property abroad is a vital element of our nation's efforts to redress our trade deficit and maintain competitiveness. The Berne Convention is a crucial step forward in those efforts. We urge you and the other members of the Foreign Relations Committee to act swiftly and favorably to adhere to this important international convention.

Many thanks for your attention to this matter.

Sincerely yours,

Marsha Carow

MSC/smv

JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN
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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

April 26, 1988

The Honorable Claiborne Pell
United States Senate
Washington, D.C. 20510

Dear Claiborne:

On June 16, 1986, President Reagan sent the Berne Convention for the Protection of Literary and Artistic Works to the Senate for ratification. The Berne Convention is the most prominent and effective mechanism for defending copyrights internationally. For over 100 years, it has protected artists and creators by providing the framework for international copyright relations among nearly all the industrialized and developing countries.

In September 1986, Mac Mathias introduced implementing legislation that would make the changes to U.S. copyright law that are necessary for the U.S. to adhere to the international standards set by the Convention. We are pleased to inform you that on April 14, 1988, the Judiciary Committee completed work on the implementing legislation and approved a DeConcini-Leahy-Hatch amendment in the nature of a substitute to S. 1301. The measure is cosponsored by Senators Simon, Grassley and Simpson. Similar legislation has been approved by the House Judiciary Committee's Subcommittee with jurisdiction over copyright matters. The full House Judiciary Committee will take up the implementing legislation in the very near future. With implementing legislation on the verge of enactment, the role of the Foreign Relations Committee in reporting a resolution of ratification is crucial.

Berne membership is vital to U.S. interests in the international marketplace of the 21st century, a marketplace in which intellectual property, such as copyrights, will play a leading role. Explosive developments in technology -- the office copier, the computer, the video recorder -- foster new forms of creativity and advance American business every day. They also make it easier to misuse and steal copyrighted works. Throughout its century of existence, Berne has shown itself to be a remarkably dynamic agreement capable of adapting to technological advances. Berne membership would give us a seat at the table -- a voice and a veto -- when the world's copyright community sits down to respond to today's technological challenges -- and tomorrow's.

A series of hearings in both the Senate and the House demonstrated a remarkable consensus among leaders from the publishing, entertainment, computer, pharmaceutical and information industries and representatives of the artistic communities in favor of U.S. adherence to Berne. Ambassador Yeutter, the late Secretary Baldrige, Secretary Verity and the Undersecretary of State for Economic Affairs testified before the Congress that U.S. membership in the Berne Convention would enhance U.S. trade policy.

Throughout the consideration of the Berne implementing legislation, the only questions raised about Berne adherence came from groups that wanted to change U.S. law on artists' rights. From one group we heard that a creator should be given greater rights to prevent any alteration to his work, while another group wanted to strictly limit the rights of a creator who has parted with his work. In line with our objective to make only those changes to U.S. law which are necessary in order to comply with Berne, we crafted a bill acceptable to all sides that does not change the current laws on artists' rights.

There remains only one substantive difference between S. 1301 and the Berne legislation before the House Judiciary Committee. It concerns the formal requirements that are imposed on an author in order for him to enjoy the benefits of copyright. Our staffs are continuing to meet with representatives from the Copyright Office and the House in an effort to resolve the remaining area of disagreement.

Mr. Chairman, we would greatly appreciate it if the Senate Foreign Relations Committee could give early consideration to the Berne Convention. We are hopeful that the Committee will recommend that the Senate give its advice and consent to the Berne Convention. Please let us know if there is anything we can do to assist your Committee as it considers this very important Convention.

Sincerely,

ORRIN G. HATCH PATRICK J. LEAHY DENNIS DECONCINI